

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GEERTSON FARMS INC., et al.,

No. C 06-01075 CRB

Plaintiffs,

**PRELIMINARY INJUNCTION  
ORDER**

v.

MIKE JOHANNNS, et al.,

Defendants.

By Memorandum and Order dated February 13, 2007, the Court concluded that the federal defendants violated the National Environmental Protection Act (“NEPA”) by failing to prepare an environmental impact statement (“EIS”) before deregulating Roundup Ready alfalfa. The Court granted plaintiffs’ motion for summary judgment because of the potential significant environmental impact of gene transmission; specifically, the acknowledged risk that the genetically engineered gene will “contaminate” organic and conventional alfalfa. The Court also found that defendants had failed to adequately consider the deregulation decision’s impact on the development of Roundup resistant weeds.

The parties subsequently submitted competing proposed final judgments, and several third parties moved to intervene in the remedial phase of this lawsuit. At a hearing on March 8, 2007, the Court granted the proposed intervenors’ motions and agreed to give them the opportunity “to present evidence to assist the court in fashioning the appropriate scope of

1 whatever relief is granted.” Forest Conservation Council v. U.S. Forest Service, 66 F.3d  
 2 1489, 1496 (9th Cir. 1995). The immediate dilemma, however, is what preliminary relief to  
 3 issue while the Court is contemplating the form of the final judgment. The issue is especially  
 4 urgent because many growers have already planted or are about to plant Roundup Ready  
 5 alfalfa.

6 **A. The preliminary injunction**

7 “In the run of the mill NEPA case, the contemplated project, whether it be a new dam  
 8 or a highway extension, is simply delayed until the NEPA violation is cured.” Idaho  
 9 Watersheds Project v. Hahn, 307 F.3d 815, 833 (9th Cir. 2002); see also National Parks &  
 10 Conservation Ass’n v. Babbitt, 241 F.3d 722, 737-38 & n.18 (9th Cir. 2001) (holding that  
 11 “where an EIS is required, allowing a potentially environmentally damaging project to  
 12 proceed prior its preparation runs contrary to the very purpose of the statutory requirement;”  
 13 however, “in ‘unusual circumstances’ an injunction may be withheld, or, more likely, limited  
 14 in scope”); Forest Conservation Council, 66 F.3d at 1496 (holding that the defendants  
 15 “should be allowed to present evidence to the court that ‘unusual circumstances’ weigh  
 16 against the injunction sought”); Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir.1985)  
 17 (stating that “absent ‘unusual circumstances,’ an injunction is the appropriate remedy for a  
 18 violation of NEPA’s procedural requirements”).

19 One circumstance that makes this case not so “run of the mill” is that in reliance on  
 20 the federal defendants’ June 2005 deregulation decision, some growers have already planted  
 21 Roundup Ready alfalfa. These plantings have occurred because plaintiffs did not seek an  
 22 injunction prior to the Court’s ruling on the merits of their claim. After weighing the balance  
 23 of harms, the Court will not order these growers to remove the alfalfa, and, indeed, plaintiffs  
 24 do not ask for such injunctive relief. Nor will the Court prohibit these growers from  
 25 harvesting, using, or selling any Roundup Ready alfalfa that has already been planted. See  
 26 Seattle Audubon Soc’y v. Evans, 771 F.Supp. 1081, 1087-95 (W.D. Wash.1991) (taking  
 27 logging industry interests into account in conducting equitable balancing for environmental  
 28

1 law violation, resulting in injunction of future timber sales, but not existing sales), aff'd, 952  
2 F.2d 297, 298 (9th Cir. 1991).

3 In most respects, however, this is a “run of the mill” NEPA case. Prior to the federal  
4 defendants’ June 2005 deregulation decision, Roundup Ready alfalfa could not be grown  
5 absent a United States Department of Agriculture permit. For those growers who have not  
6 yet planted Roundup Ready alfalfa, or who intend to plant additional acres of the crop, an  
7 injunction prohibiting the planting of the genetically engineered crop pending the federal  
8 defendants’ completion of the EIS, or at least pending the Court’s fashioning of permanent  
9 injunctive relief, simply delays the project—in this case, delays the switch to Roundup Ready  
10 alfalfa. In other words, an injunction prohibiting future plantings maintains the status quo.

11 Neither the intervenors nor the government has identified any “unusual  
12 circumstances” that would warrant allowing an *increase* in the number of acres planted with  
13 Roundup Ready alfalfa while the Court considers the scope of permanent injunctive relief.  
14 At oral argument the Court asked counsel for the intervenor growers what harm farmers  
15 would suffer if the Court enjoined the *future* planting of alfalfa. Counsel responded that some  
16 growers might have already purchased the seeds for planting, and thus would lose their  
17 investment, although he could not answer whether the growers would ultimately be  
18 reimbursed for such loss by insurance or the sellers. After the hearing the intervenors  
19 submitted an additional declaration opining that the growers do not have any contractual  
20 right to reimbursement. Counsel also explained that an injunction would prevent these  
21 growers from planting the alfalfa variety of their choice. An injunction, however, always  
22 prevents someone from doing what he would prefer, whether it be building a dam,  
23 completing a highway project, or planting a genetically engineered crop; the growers’  
24 disappointment in the delay to their switch to Roundup Ready alfalfa is not an interest which  
25 outweighs the potential environmental harm identified in the Court’s February 13, 2007  
26 Memorandum and Order. See National Parks & Conservation Ass’n, 241 F.3d at 737  
27 (“When the proposed project may significantly degrade some human environmental factor,  
28 injunctive relief is appropriate”).

1 Defendants and intervenors also complain that an order prohibiting an increase in the  
2 acreage of Roundup Ready alfalfa, that is, prohibiting any future plantings, will cause those  
3 growers who are about to plant such alfalfa “to scramble to make last-minute changes to farm  
4 planting plans and to find appropriate seed.” See Second Declaration of Mark H. McCaslin  
5 ¶ 4. It bears repeating that these are growers who are *replacing* conventional alfalfa with  
6 Roundup Ready alfalfa; as the intervenors conceded at oral argument, alfalfa is a perennial  
7 crop that is only planted every three to four years. Thus, these growers’ primary experience  
8 is with non-genetically engineered alfalfa varieties.

9 In any event, to minimize the harm to those growers who intend to imminently plant  
10 Roundup Ready alfalfa, the Court will preliminarily enjoin all future planting of Roundup  
11 Ready alfalfa beginning **March 30, 2007**. Those growers who intend to plant Roundup  
12 Ready alfalfa in the next three weeks, *and have already purchased the seed*, may plant the  
13 seed. All growers intending to plant after March 30, 2007, or who have not yet purchased  
14 the seed, must plant non-genetically engineered alfalfa.

15 Accordingly, the federal defendants’ June 2005 decision deregulating Roundup Ready  
16 alfalfa is VACATED and Roundup Ready alfalfa is once again a regulated article. The  
17 federal defendants shall issue the appropriate notices notifying Roundup Ready alfalfa sellers  
18 and growers that no Roundup Ready alfalfa seed may be planted after March 30, 2007. In  
19 addition, only that seed which has already been purchased by growers may be planted prior  
20 to March 30, 2007. All sales of Roundup Ready alfalfa seed are prohibited pending the  
21 Court’s issuance of permanent injunctive relief.

## 22 **B. Permanent Injunctive Relief**

23 Before determining the scope of the final judgment, the Court will consider whatever  
24 additional evidence the intervenors wish to provide. All such evidence, and any  
25 supplemental supporting memoranda, must be filed on or before March 23, 2007. If the  
26 government wishes to submit additional evidence or a further memorandum, it must do so by  
27 the same date. Plaintiffs’ response, if any, must be filed by April 6, 2007. The Court will  
28 hear oral argument on the appropriate permanent injunctive relief at 11:00 a.m. on Friday,

1 April 27, 2007. The Court will advise the parties prior to the hearing if any live testimony is  
2 required. The Court is not ordering any discovery.

3 **IT IS SO ORDERED.**

4 Dated: March 12, 2007



5 CHARLES R. BREYER  
6 UNITED STATES DISTRICT JUDGE  
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